No. 95-1242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MICHAEL O. LEAVITT, as Governor of the State of Utah; and JAN GRAHAM, as Attorney General of the State of Utah,

Petitioners,

—v.—

JANE L., JANE F., and JULIE S., on behalf of themselves and all others similarly situated; *et. al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly refused to rewrite Utah Code Ann. § 76-7-302, which prohibits virtually all abortions throughout pregnancy and was intended to provide a direct challenge to *Roe v. Wade*.

2. Whether the court of appeals properly applied this Court's decision in *Thornburgh v. American College of Obstetricians & Gynecologists* in holding unconstitutional Utah's statutes requiring that physicians performing abortions after viability use the method of abortion most likely to result in fetal survival, unless that method would endanger the pregnant woman's life or cause "grave damage" to her "medical health."

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Respondents Jane L., *et al.*, respectfully submit the following brief in opposition to the petition for certiorari filed by the Governor and the Attorney General of Utah (hereinafter "petitioners" or "the State"), docketed on February 5, 1996.

COUNTERSTATEMENT OF THE CASE

On January 25, 1991, the Governor of Utah signed into law a criminal ban on nearly all abortions ("S.B. 23"). S.B. 23 permits abortions only under four narrow circumstances: (1) where an abortion is necessary to save the woman's life; (2) where the pregnancy is the result of rape, rape of a child, or incest as defined by Utah Code Ann. §§ 76-5-402, 76-5-402.1, 76-5-402(10) or 76-7-102, that was reported to a law enforcement agency prior to the abortion; (3) where an abortion is necessary to prevent "grave damage" to the woman's "medical health"; and (4) where the abortion is necessary to prevent the birth of a child that would be born with "grave defects." Utah Code. Ann. § 76-7-302(2).[1] After 20 weeks gestation, the ban becomes even more extreme, with the exception for rape and incest phased out. Utah Code. Ann. § 76-7-302(3).

After plaintiffs filed their original complaint, which included the allegation that the statute imposed capital punishment both on the performing physician and the woman obtaining an abortion, the Utah Legislature met again in special session on April 17, 1991, to amend the statute. In addition to clarifying that the death penalty did not apply to the general ban on abortion, the legislature amended two 1974 statutes, Utah Code Ann. §§ 76-7-307 & -308, which plaintiffs had also challenged in their original complaint. As amended, these choice-of-method provisions

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[1]S.B. 23 also made a technical amendment to Utah Code Ann. § 76-7-315.

require on pain of criminal penalties[2] that a physician performing a post-viability abortion use that method most likely to preserve the fetus unless that method would cause "grave" damage to the woman's "medical health." *See* Pet. 4.[3] There was no discussion at the special session on the reasons for this change; in fact, the session lasted only four hours. *See* B-4.[4]

In enacting a new § 302 and repealing the former section, the legislature deliberately obliterated the distinction in prior Utah law between the legality of post- and pre-viability abortions in order to test the limits of *Roe v. Wade*, 410 U.S. 113 (1973). Former § 302(3), passed in 1973 and re-enacted in 1974, had attempted to follow *Roe* by prohibiting post-viability abortions except when necessary to "save the life of the pregnant woman or to prevent serious and permanent damage to her health."[5] Section 302, on the

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[2]Performing an abortion in violation of the ban or the choice-of-method provisions is a third-degree felony, punishable by up to five years imprisonment, Utah Code Ann. § 76-3-203(3), and a $5,000 fine. Utah Code Ann. § 76-3-301(b). If a clinic were convicted under the law, the fine could be up to $20,000. Utah Code Ann. § 76-3-302(1).

[3]The previous language in the 1974 statute waived the choice-of-method provision for post-viability abortions in case of "serious and permanent" health damage to the woman.

[4]Citations to the appendix to the petition for certiorari are in the form "A-__," "B-__," "C-__"; citations to the petition are in the form "Pet. __"; citations to the appendix to this brief are in the form "__a."

[5]Former section 302 provided:

> An abortion may be performed in this state only under the following circumstances:
>
> (1) If performed by a physician; and
>
> (continued...)

other hand, criminalized nearly all abortions, both before and after viability. Although the 1991 ban phased out an exception for women pregnant as a result of rape or incest after 20 weeks gestation, Utah Code. Ann. § 76-7-302(3), this dividing line was not intended as a viability cut-off. As the district court held, abortions will be requested after 20 weeks for both viable and non-viable fetuses. *See* B-21.[6]

The 1991 legislation adds intensifying adjectives to press the Constitution to the breaking point. Instead of allowing abortions without restriction before viability, and

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[5](...continued)

> (2) If performed ninety days or more after the commencement of the pregnancy, it is performed in a hospital; and
>
> (3) If performed when the unborn child is sufficiently developed to have any reasonable possibility of survival outside its mother's womb, the abortion is necessary to save the life of the pregnant woman or to prevent serious and permanent damage to her health.

[6]Every time the Utah legislature sought to regulate post-viability abortions from 1973 onward, it used the medical and legal definition of viability set forth in *Roe* and subsequent cases, viz., the phrase "sufficiently developed to have any reasonable possibility of survival outside of the mother's womb." *See, e.g.*, Utah Code Ann. §§ 307, 308, former 302. The failure to use this definition, or any other similar phrase denoting viability, in S.B. 23 or S.B. 4, taken together with the context in which the ban was passed, demonstrates that the legislature did not intend to define 20 weeks as viability. Rather, the 20-week limit reflected a disapproval of some women, particularly rape and incest victims, who would seek late abortions. The district court itself appears to have adopted this view. *See* B-21 ("Twenty weeks certainly constitutes fair notice to the woman of the abortion ban to be imposed, and her consent to abide by the ban except for health reasons fairly can be implied.").

instead of permitting abortions to protect the woman's life and health after viability, as required by *Roe*, the 1991 ban requires that a physician find "grave damage" to the woman's health for all abortions, no matter what the stage of pregnancy. Utah Code Ann. § 76-7-302(2)(d). Instead of clearly giving preference to the woman's health over the state's interest in the fetus after viability, the 1991 amendments to the choice-of-method laws require that the method favor the fetus unless necessary to avert "grave damage" to the woman's health. Utah Code Ann. §§ 76-7-307, -308. A medical emergency, to warrant exemption from the laws, must be "serious." Utah Code Ann. § 76-7-315.[7]

Plaintiffs challenged both the broad criminal ban on abortion, Utah Code Ann. § 76-7-302, and the two newly amended choice-of-method statutes, Utah Code Ann. § 76-7-307 & 308, on the grounds that they violated plaintiffs' federal constitutional rights, including, *inter alia*, their rights to privacy, due process, equal protection, freedom of

[7]Like the 1991 Utah legislature, the 1973 and 1974 legislatures were already making distinctions in Utah criminal abortion statutes by conditioning the word "health" with one or more different and specific adjectives. The 1973 law permitted early abortions "if in the attending physician's best clinical judgment the abortion is necessary to preserve the *life, physical or mental health* of the pregnant woman." *Doe v. Rampton*, 366 F. Supp. 189, 194 (D. Utah 1973) (three-judge court) (quoting statute) (emphasis added). After 91 days, however, the abortion must be "necessary to preserve the *life or physical health* of the pregnant woman." *Id.* (emphasis added). Finally, after 180 days, the abortion must, "as concurred in by two consulting physicians," be "necessary to save the *life* of the pregnant woman or to prevent *serious and permanent damage to her physical health*." *Id.* (emphasis added). Thus, the Utah legislature clearly intended "physical health" to be less restrictive than "serious and permanent damage to . . . physical health."

religion and freedom of speech.[8] On April 10, 1992, the district court granted defendants' motion to dismiss and summary judgment motion in part, holding that the challenged provisions: were not unconstitutionally vague; did not violate the religion clauses of the First Amendment; did not violate the Free Speech Clause of the First Amendment; did not violate the Thirteenth Amendment; and did not constitute invidious sex discrimination prohibited by the Equal Protection Clause. The court also held that the fetal experimentation restriction neither was vague nor violated the right to privacy. The court reserved decision on plaintiffs' challenges to Utah Code Ann. §§ 76-7-307, 308, 315, and 304(2), as well as on plaintiffs' privacy cause of action against § 76-7-302, pending this Court's decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). *See Jane L. v. Bangerter*, 794 F. Supp. 1537, 1549 n.18 (D. Utah 1992); *Jane L. v. Bangerter*, 794 F. Supp. 1528 (D. Utah 1992).[9]

[8]Besides these statutes, plaintiffs challenged a 1974 requirement that the physician notify the husband of every woman seeking an abortion "if possible," Utah Code Ann. § 76-7-304(2), which the district court invalidated, *see* B-30-31; a 1974 ban on fetal experimentation, Utah Code Ann. § 76-7-310, invalidated by the court of appeals, *see* A-21; and a 1974 provision exempting physicians from other restrictions only in cases of "serious medical emergenc[ies]," Utah Code Ann. § 76-7-315, which was upheld by the district court, *see* B-39, and the court of appeals, *see* A-14.

[9]The second opinion, 794 F. Supp. at 1528, held that Utah had waived its Eleventh Amendment immunity, and that the court therefore had jurisdiction to adjudicate plaintiffs' claims under the Utah Constitution (which plaintiffs had sought to voluntarily dismiss), except those Utah constitutional claims corresponding to the federal claims reserved for decision until after *Casey*. The court proceeded to dismiss with prejudice all non-reserved Utah constitutional claims.

On December 17, 1992, the district court held that Utah's husband notice requirement was unconstitutional, but, rather than invalidate the entire criminal ban (Utah Code Ann. § 76-7-302), the district court substantially rewrote the statute to criminalize abortions performed after 20 weeks gestation. *See* B-13-20. To "save" the post-20 week ban, which could not stand independently (§ 76-7-302(3)), the district court grafted exceptions to the invalid pre-20-week ban (§ 76-7-302(2)) onto the subsection regulating post-20 weeks abortions. B-13-15. While recognizing that the statute as rewritten[10] would apply to abortions of *both* "non-viable [and] viable" fetuses, the district court nevertheless asserted that prohibition "of such late, non-therapeutic abortions does not impose an undue burden on a woman's liberty interest." B-21. The district court also upheld the choice of method provisions and the "serious medical emergency" section as consistent with *Casey*. Judgment was entered by the district court on January 14, 1993.

The Court of Appeals reversed the district court on almost all claims, holding in particular that Utah's criminal ban on abortions was not severable, and that Utah's restrictions on the method of abortion to be used after viability required an impermissible trade-off of the woman's health. *See* A-5-14 (severability); A-21-28 (choice-of-method). By order dated November 6, 1995, the Court of Appeals denied the State's petition for rehearing by the panel as well as the State's suggestion for rehearing *en banc*. *See* C-2-3.

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[10]The court found that the 20-week cut-off meant that the criminal ban applied only for abortions in or after the 21st week gestation or in or after the 23rd week as measured from the last menstrual period (lmp) because the statute used the words "[a]fter 20 weeks." *See* B-9.

REASONS FOR DENYING THE WRIT

In seeking review by this Court, the State has failed to establish any of the factors that weigh in favor of a grant of certiorari. On the contrary, the decision of the court below is consistent with the decisions of other federal courts of appeals and with the decisions of this Court.

The State attacks two holdings of the court of appeals. First, the state claims that the Tenth Circuit's refusal to sever Utah's ban on abortions is inconsistent with its obligations under the Eleventh Amendment and is incorrect under Utah severability law. However, because the abortion ban's two subsections are inextricably intertwined, severance of the second subsection from the first requires rewriting of the statute. Such rewriting of a state statute by a federal court not only constitutes positive legislation, but also violates federalism. *See Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988) ("we will not rewrite a state law to conform it to constitutional requirements"). Moreover, such rewriting is especially inappropriate where, as the court of appeals here found, the revision "would undermine legislative intent." A-13.

Second, the State claims that the court of appeals erred when it relied on this Court's opinion in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), in invalidating Utah's choice-of-method statutes, arguing that *Thornburgh*'s analysis was effectively overruled by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Pet. 19-20. Contrary to the State's argument, those portions of *Thornburgh* on which the court of appeals relied were implicitly re-affirmed by *Casey*, which narrowly limited its overruling of *Thornburgh*. The court of appeals then correctly held that *Thornburgh* dictates the invalidation

of Utah's statutes, because they require an impermissible trade-off of the woman's health.

I. THE COURT OF APPEALS PROPERLY REJECTED THE STATE'S PROPOSED REDRAFTING OF UTAH CODE ANN. § 76-7-302.

The State argues that the court of appeals erred in its application of Utah severability law in rejecting the district court's redrafting of section 302, the abortion ban. First, this claim is not worthy of review by this Court because it involves no "important federal question," *see* Sup. Ct. R. 10. Each of the applicable reasons described in Supreme Court Rule 10 which this Court considers in deciding whether to grant certiorari requires the presence of "an important federal question."[11] Far from being an important federal question, the State's severability argument chiefly raises issues of Utah state law.[12]

Second, the only even colorable "federal" issue at stake is not an issue of *federal law* at all, but an issue of *federalism*; as shown below, however, federalism concerns strongly support the Tenth Circuit's refusal to usurp the authority of the Utah Legislature by redrafting its statutes.

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[11]Only Rule 10(a) describes a factor not necessarily involving an important federal question, *viz.*, a conflict in the circuits or a departure by a court of appeals "from the accepted and usual course of judicial proceedings" so extreme as to justify the "exercise of this Court's supervisory power." Sup. Ct. R. 10(a). Petitioners claim no conflict in the circuits whatsoever and do not invoke this Court's "supervisory power."

[12]Indeed, this is conceded by the State. *See* Pet. 9 ("The question of severability is a question of state law.").

Finally, as also set forth below, the refusal of the court below to redraft Utah's abortion ban was well-grounded in Utah severability law and raises no extraordinary legal issues worthy of this Court's attention. Indeed, because the State's proposed revision of Utah's statute is itself unconstitutional, review of the appellate court's routine application of Utah law would not alter the final result: Utah's abortion ban is unconstitutional in its entirety.

When, as here, state severability doctrine lends no support to saving an invalid law, the federal courts will not hesitate to strike the statute as a whole. *Wyoming v. Oklahoma*, 502 U.S. 437, 460 (1992) ("Nothing remains to be saved once [the challenged] provision is stricken. Accordingly, the Act must stand or fall as a whole."); *see also Chapman v. United States*, 500 U.S. 453, 464 (1991) ("The canon of construction that a court should strive to interpret a statute in a way that will avoid an unconstitutional construction is useful in close cases, but it is 'not a license for the judiciary to rewrite language enacted by the legislature.'") (quoting *United States v. Monsanto*, 491 U.S. 600, 611 (1989)). The principle that federal courts must be especially careful in severing state statutes, lest the result be a dramatic federal revision of state law that is opposed to the legislature's intent, is uniformly followed both by this Court and the courts of appeals. *See Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988) ("we will not rewrite a state law to conform it to constitutional requirements"); *Eubanks v. Wilkinson*, 937 F.2d 1118, 1125 (6th Cir. 1991) ("When a federal court deals not with a federal statute but with a state statute, its task is further complicated. A federal court must always be aware of the federalism concerns that arise whenever it deals with state statutes."); *National Advertising Co. v. Town of Niagara*, 942 F.2d 145, 151 (2d Cir. 1991) (refusing to revise ordinance because "interests of

federalism and comity dictate conservatism in imposing our interpretive views on state statutes"); *Hill v. City of Houston*, 789 F.2d 1103, 1112 (5th Cir. 1986) (en banc) ("The principles of federalism forbid a federal appellate court to arrogate the power to rewrite a municipal ordinance."), *aff'd*, 482 U.S. 451 (1987).[13] The court of appeals faithfully adhered to these principles in declining to rewrite Utah's abortion ban statute.

Under Utah law, "[w]hether a part of a statute that is held unconstitutional is severable from the remainder of the statute depends on legislative intent." *Stewart v. Public Serv. Comm'n*, 885 P.2d 759, 779 (Utah 1994). The two-part Utah standard for severability as outlined in *Stewart* is:

> [W]hether the legislature would have passed the statute without the objectionable part, and whether or not the parts are so dependent upon each other that the court should conclude the intention was that the statute be effective only in its entirety.

Id. (quoting *Union Trust Co. v. Simmons*, 211 P.2d 190, 193 (Utah 1949)). Because the law fails both *Stewart* tests, the

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[13]The federal principle counseling against judicial revision of state law is echoed in Utah law. Recently, the Utah Supreme Court wrote:

> A cardinal rule of statutory construction is that courts are not to infer substantive terms into the text that are not already there. Rather, the interpretation must be based on the language used, and the court has no power to rewrite the statute to conform to an intention not expressed.

Berrett v. Purser & Edwards, 876 P.2d 367, 370 (Utah 1994) (citation omitted). Even "in seeking a constitutional construction, [the Utah Supreme Court] will not rewrite a state statute or ignore its plain intent." *Provo City Corp. v. Willden*, 768 P.2d 455, 458 (Utah 1989).

court of appeals correctly held that the entire ban (Utah Code Ann. § 76-7-302) must fall.

Moreover, a "savings clause," such as is found in Utah Code Ann. § 76-7-317 and relied upon by the State, is not decisive. The Utah Supreme Court has "held that even where a savings clause existed, where the provisions of the statute are interrelated, it is not within the scope of [the] court's function to select the valid portions of the act and conjecture that they should stand independently of the portions which are invalid." *State v. Salt Lake City*, 445 P.2d 691, 696 (Utah 1968). *See also United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968) ("the ultimate determination of severability will rarely turn on the presence or absence of [a severability clause]"); *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 445 n.37 (1983) (declining to sever statute despite savings clause); *id.* at 425 & n.8 (savings clause); A-13 ("The Utah Supreme Court has repeatedly ignored [severability] clauses in the name of legislative intent.").

The State contends -- citing no evidence whatsoever -- that the Utah Legislature intended that § 76-7-302 embody "two separate provisions restricting abortion," Pet. 5: one to regulate pre-viability abortions (subsection (2)), and another to regulate post-viability abortions (subsection (3)). This contention is not only unsupported by the 1991 legislative history, but is in fact antithetical to the true legislative purpose: to reject the entire legal construct established by *Roe*, including the viability demarcation line.

A. Utah Enacted A Single Ban On Abortion.

Utah's legislative intent in passing the 1991 abortion amendments is undisputed: to pass a restrictive criminal abortion statute that could be used as the vehicle to overturn *Roe v. Wade*. *See Utah Women's Clinic, Inc. v. Leavitt*, 844 F. Supp. 1482, 1484 (D. Utah 1994) (the 1991 legislation "was passed with the hope that *Roe* would be overturned"). Indeed, the Legislature passed a special appropriations measure to finance the legal fees for defending the statute and overturning *Roe*. The 1991 criminal ban on abortions contained only a few, narrow exceptions, and two of these exceptions -- for abortions in cases of reported rape and incest -- were completely eliminated "[a]fter 20 weeks gestational age, measured from the date of conception." Utah Code Ann. § 76-7-302(3). The 20-week limit (22 weeks lmp) on abortions in cases of rape and incest was not a viability line; rather, the legislature wanted to limit the time period during which rape and incest victims could obtain abortions. The district court itself appears to have adopted this view. *See* B-21 ("Twenty weeks certainly constitutes fair notice to the woman of the abortion ban to be imposed, and her consent to abide by the ban except for health reasons fairly can be implied.").

From 1973 until 1991, the Utah Legislature consistently used language drawn from *Roe*, to define and regulate post-viability abortion, viz., "sufficiently developed to have any reasonable possibility of survival outside of the mother's womb." *See* Utah Code Ann. §§ 76-7-307, -308 (choice of method statutes); former Utah Code Ann. § 76-7-302(3) (1990) (restricting post-viability abortions). The 1991 Legislature eliminated this language and any reference to viability precisely because it was seeking to overturn *Roe*, and especially its trimester framework, which allows for severe limits on abortion only after viability. Thus, the

State's contention that the post-20-week restrictions constitute a post-viability restriction is not only unsupported by, but antithetical to, legislative intent, which was to obliterate the significance of viability and to protect a fertilized egg throughout pregnancy.

As further proof that the Utah Legislature did not intend to enact a post-viability ban on abortions, even the district court recognized that subsection (3), if allowed to stand alone as rewritten, regulates both pre- and post-viability abortions. *See* B-21 (ban on "late, nontherapeutic abortions" valid "whether the fetus is non-viable or viable after the 20 week period"). Subsection (3)'s application to post-viability abortions, if upheld, would, strangely enough, make the 1991 law *more liberal* as to post-viability abortion than the previous Utah law which was repealed explicitly so that the regulation of abortion could be made more restrictive throughout pregnancy. Moreover, if allowed to stand as rewritten by the court below, subsection (3) will be even less restrictive than *Roe*, a result antithetical to legislative intent. *Roe* allows the state to assert its interest in the fetus by prohibiting abortion after viability, so long as the prohibition contains exceptions for abortions necessary to protect the woman's "life or health." 410 U.S. at 164-65. This aspect of *Roe* was specifically re-affirmed by this Court in *Casey*, 505 U.S. at 846. Utah's ban, however, permits abortions after 20 weeks from conception -- and hence also after viability -- "to prevent the birth of a child that would be born with grave defects," Utah Code Ann. § 76-7-302(2)(e). The State claims that subsection (3)'s other exceptions satisfy *Roe*'s requirement of post-viability exceptions for life and health. Given the clear legislative intent to have the most restrictive abortion law permitted by law, preserving one subset of the ban which actually is *more liberal than* the minimal standards of federal law is contrary

to legislative intent. Thus, under *Stewart*, the ban cannot be severed to uphold its post-20-week applications.

B. Subsection (3) Is Inextricably Intertwined With Subsection (2) And Does Not Serve A Legitimate Purpose.

Subsection (3) of Utah Code Ann. § 76-7-302 also fails the second *Stewart* test because it is inextricably intertwined with the invalidated portion of the statute, § 76-7-302(2). Subsection (3) states:

> After 20 weeks gestational age, measured from the date of conception, an abortion may be performed only for those purposes and circumstances described in Subsections (2)(a), (d), and (e).

Utah Code Ann. § 76-7-302(3). Thus, subsections (2) and (3) are "so dependent upon each other that the court should conclude the intention was that the statute be effective only in its entirety." *Stewart*, 885 P.2d at 779; *see also Doe v. Rampton*, 366 F. Supp. 189, 193-94 (D. Utah 1973) (three-judge court). As the court of appeals correctly stated:

> With the nullification of the abortion ban in section 302(2), the statute was gutted, and section 302(3) was left purposeless without an abortion ban to modify. It is not our role to rewrite the general abortion ban by elevating section 302(3), which simply modified a now-defunct statute, to the general rule.

A-10.

Finally, the purpose of the 1991 amendments to the Utah Abortion Control Act is one deemed illegitimate by

the Supreme Court: to place "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus," *Casey*, 505 U.S. at 877. Under Utah severability law, for a provision to be severable, it must both be capable of standing alone *and* must also "serve a legitimate legislative purpose." *Berry v. Beech Aircraft*, 717 P.2d 670, 686 (Utah 1985). Here, the Legislature's purpose was illegitimate,[14] and *Casey* specifically held that a statute regulating abortion must be invalidated if it has an improper "purpose or effect." *Id.*, 505 U.S. at 878.

Nor can the State now invent a *post hoc* legitimate purpose.[15] In analyzing the purpose of legislation subject to heightened scrutiny, the Supreme Court has consistently refused to accept legislative purposes not supported by legislative history. *See, e.g., Califano v. Goldfarb*, 430 U.S. 199, 224 (1977) (Stevens, J., concurring in the judgment) (court will reject recitation of a legitimate purpose for a statute actually based on illegitimate purpose); *Michael M.*

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[14]As the court wrote in *Doe v. Rampton*, 366 F. Supp. at 193-94:

> [T]he overriding purpose and dominant effect of these statutes is the wholly improper one of making the obtaining or performing of an abortion in Utah extremely burdensome or impossible in every case. Each and every part of these statutes was intended to and does contribute, when each statute is read as a whole, to that improper purpose and effect.

[15]Were the State permitted to manufacture a legitimate purpose for abortion restrictions, *Casey*'s prohibition on statutes that have an illegal purpose (or effect) would be rendered meaningless, for the State could simply assert some other purpose, regardless of "whether this reasoning in fact underlay the legislative decision." *Flemming v. Nestor*, 363 U.S. 603, 612 (1960). Of course, had the court of appeals adopted the State's manufactured purpose, it would have failed to adhere to the *legislative* purpose of the law, but would instead be supplying it with a *judicial* purpose.

v. *Superior Ct. of Sonoma County*, 450 U.S. 464, 470 (1981) ("State's asserted reason for the enactment of a statute may be rejected, if it 'could not have been a goal of the legislation'") (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975)); *see also Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987) (under Establishment Clause, Court requires that State's articulation of legislative purpose be sincere). Thus, the court of appeals correctly held that subsection (3) must fall with subsection (2).

C. Even Under The State's Proposed Revision, The Utah Abortion Ban Is Unconstitutional In Its Entirety.

Further, even assuming *arguendo* that the court of appeals should have found that subsection (3) of § 76-7-302 is severable from subsection (2), subsection (3) is itself constitutionally defective. First, in *Casey*, the Supreme Court reaffirmed that "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on non-therapeutic abortions." *Id.*, 505 U.S. at 860. Thus, "*[w]henever it may occur*, the attainment of viability . . . serve[s] as the critical fact." *Id.* (emphasis added). In recognizing that viability does not occur at the same point in every pregnancy, *Casey* is consistent with a line of prior Supreme Court precedents.

In *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), this Court rejected the position that "a specified number of weeks must be fixed by statute as the point of viability." *Id.* at 65. Indeed, this Court found that:

> it is not the proper function of the legislature or the courts to place viability . . . at a specific point in the gestation period. The time when viability is

> achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician.

Id. at 64. In *Colautti v. Franklin*, 439 U.S. 379 (1979), the Court reaffirmed this holding, *id.* at 388-89, 396, making clear that "[s]tate regulation that impinges upon this determination . . . must allow the attending physician 'the room he needs to make his best medical judgment.'" *Id.* at 397 (quoting *Doe v. Bolton*, 410 U.S. 179, 192 (1973)).[16]

The Utah statute, as the State proposes to rewrite it, does exactly what is prohibited under *Casey* and the prior holdings of this Court. It bans abortions after 20 weeks even if, in the physician's medical judgment, the fetus is not viable. The ban wrests from the physician all discretion to make the viability determination and will ban a significant percentage of late but nonetheless pre-viable abortions. Under *Casey* and earlier decisions, this is unconstitutional. *Casey*, 505 U.S. at 878.

Second, the ban on abortions after 20 weeks also fails to provide an adequate exception for women who need a late abortion to safeguard their health. In *Casey*, the Supreme Court reaffirmed that, even after viability, the state

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[16]Nothing in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), compels a different conclusion. In *Webster*, the Court upheld a Missouri law that required physicians to perform tests necessary to make a determination of viability at 20 weeks. Justice O'Connor, who provided the key vote to uphold the statute, found that this provision did not "conflict with any of the Court's past decisions concerning state regulation of abortion." *Id.* at 525 (O'Connor, J., concurring in part and concurring in the judgment). Therefore, *Webster* in no way casts doubt on either *Danforth* or *Colautti*.

may not prohibit a woman from having an abortion to protect her life or health. 505 U.S. at 846; *see also id.* at 880 ("the essential holding of *Roe* forbids a State from interfering with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health"). Section 76-7-302(3) ignores this command. Instead, it prohibits a woman who will suffer damage to her health to have an abortion unless she will face "grave damage" to her "medical" health. This language is more restrictive than the health exception required by *Roe* and *Casey*.[17] Neither *Casey* nor *Roe* differentiates between different degrees of damage to health, but leaves these difficult judgments to physicians who must render this necessary medical care.

Thus, this Court should decline to review the decision of the court below refusing to rewrite Utah's abortion ban, both because that decision is well-grounded in severability principles, and because the subsection of the law which the State seeks to preserve is itself unconstitutional.

[17]It is elementary "that a statute should be interpreted so as not to render one part inoperative" or unnecessary. *Colautti*, 439 U.S. at 392; *see also Bridger Coal Co./Pac. Minerals, Inc. v. Office of Workers' Compensation Programs*, 927 F.2d 1150, 1153 (10th Cir. 1991) ("We will not construe a statute in a way that renders words or phrases meaningless, redundant, or superfluous."). Equating "grave damage to the pregnant woman's medical health" with "health," as the State seeks to do, violates this canon of construction.

II. THE COURT OF APPEALS PROPERLY FOLLOWED THIS COURT'S DECISION IN *THORNBURGH* IN HOLDING THAT UTAH'S "CHOICE OF METHOD" STATUTES VIOLATE THE RIGHT OF PRIVACY.

The State asks this Court to find that *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), was overruled by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), insofar as *Thornburgh* held that maternal health must "be the physician's paramount consideration," 476 U.S. at 769, even after viability. This argument is meritless.

Thornburgh's holding on Pennsylvania's post-viability restriction was based on the Court's earlier decision in *Colautti v. Franklin*, 439 U.S. 379, 397-401 (1979), *see Thornburgh*, 476 U.S. at 769; *Colautti*, in turn, was based on *Roe*'s holding that, even after viability, abortion must be permitted "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Roe*, 410 U.S. at 165; *see Colautti*, 439 U.S. at 400 ("woman's life and health must always prevail over the fetus' life and health when they conflict"). *Casey* specifically reaffirmed this holding of *Roe*:

> We also reaffirm *Roe*'s holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

505 U.S. at 879. Thus, the premise from *Roe* upon which *Thornburgh*'s holding was based was not overruled, but

reaffirmed by *Casey*.[18] *See* A-25-26 (*Casey* reaffirmed *Roe*, and *Casey*, *Roe*, and *Thornburgh* are all part of a "consistent strain of abortion jurisprudence" regarding post-viability abortions); *see also Women's Medical Professional Corp. v. Voinovich*, No. C-3-95-414, 1995 U.S. Dist. LEXIS 19009, at *113-16 (S.D. Ohio Dec. 13, 1995) (relying on *Thornburgh* and *Colautti* to find likelihood of success on the merits of challenge to Ohio choice-of-method requirement).[19]

The State, realizing that this Court is unlikely to overrule *Thornburgh*'s direct holding, then argues that "the Utah statute does not require the mother to bear any increased medical risk in order to save her viable fetus." Pet. 21. But this claim is contrary to the text of the post-viability restrictions, which require the woman to endure "grave damage to her health" before her health becomes the paramount concern. Thus, unless the court of appeals were

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[18]To be sure, *Casey* does overrule *Thornburgh* in part, but the partial overruling is extremely narrow, and does not touch *Thornburgh*'s post-viability holding:

> [W]e depart from the holding[] of . . . *Thornburgh to the extent* that we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion.

Casey, 505 U.S. at 883 (emphasis added).

[19]The *Voinovich* opinion holds that a state "may not take away a pregnant woman's right, as recognized in *Casey*, to have a post-viability abortion which is necessary to preserve her life or health," *id.* at *16, and that even a strict scrutiny analysis might impermissibly narrow this exception by allowing the state, if it could show a compelling interest, to restrict a woman's right to a health-based abortion after viability.

to hold that "grave damage" is equivalent to "damage" -- and that "grave" is a meaningless intensifier[20] -- the Utah choice-of-method statutes must fall under *Thornburgh*.[21] As the court of appeals held, "sections 307 and 308 clearly demand that a woman bear an 'increased medical risk' in

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[20]Utah law adheres to the canon of statutory construction that "[e]ffect should be given to every word, phrase, clause, and sentence of the statute where reasonably possible." *Chez v. Utah State Bldg. Comm'n*, 74 P.2d 687, 690 (Utah 1937). Clearly, equating "grave damage to the woman's medical health" with "health" violates this basic rule. Moreover, the construction, adopted by the court of appeals, that the Utah choice-of-method statutes "demand that a woman bear an 'increased medical risk,'" is not only a "reasonably possible" construction, but the construction most consistent with the Legislature's intention to elevate fetal life and health above the woman's health wherever it could.

[21]*Thornburgh* specifically rejected a construction, similar to that proposed by the State, of a statute requiring the physician to use the method of abortion most likely to result in fetal survival unless "that technique 'would present a significantly greater medical risk to the life or health of the pregnant woman.'" *Id.* at 768 (quoting Pennsylvania statute). The district court had held that "the statute's words 'significantly greater medical risk' do not mean some additional risk (in which case unconstitutionality is apparently conceded) but only a 'meaningfully increased' risk." *Id.* at 769. In a holding directly applicable to this case, the Supreme Court agreed with the Court of Appeals' reversal of the district court:

> The Court of Appeals . . . point[ed] out that such a reading is inconsistent with the statutory language and with the legislative intent reflected in that language; that the adverb "significantly" modifies the risk imposed on the woman; that the adverb is "patently not surplusage"; and that the language of the statute "is not susceptible to a construction that does not require the mother to bear an increased medical risk in order to save her viable fetus."

Id. at 769 (quoting Court of Appeals decision).

order to save the life of a viable fetus." A-28. Accordingly, the court of appeals properly held that these provisions are unconstitutional.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: March 6, 1996. Respectfully submitted,

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